United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7160

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

MUSIC RESEARCH, INC., and ADELPHI RECORDS, INC.,

Plaintiffs-Appellees-Appellants,

v.

VANGUARD RECORDING SOCIETY, INC.,

Defendant & Third Party
Plaintiff-Appellant-Appellee,

v.

HERB GART, d/b/a HERB GART MANAGEMENT, INC.,

Third Party Defendant.

REPLY BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS

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Preliminary Statement

In its Brief filed with this Court, pp. 6-15, Vanguard recites its own version of the facts of this case. The plaintiffs contest several of Vanguard's statements and will discuss these in the course of their argument. As a threshold proposition, however, the plaintiffs, in light of the jury verdict, are entitled to every favorable inference which the record permits. City of West Plains v. Loomis, 279 F.2d 564, 567 (8th Cir. 1960); 5A J. Moore, Federal Practice, (2d ed. 1975), ¶50.07[2], pp. 2356-2357. Further, Vanguard is not entitled to a trial de novo in this Court, but only a determination of whether the Trial Court abused its discretion in refusing to set aside the verdict and grant judgment n.o.v. or a new trial. Miller v. Ablin, 180 F.2d 437 (2d Cir. 1950). In this context, the Trial Court was entitled to disregard harmless errors made at the trial, and even "prejudicial" errors not the subject of timely objection. J. Moore, supra, ¶59.08[1], p.59-100.

The instant brief shall respond to the Points raised in the appellee's brief in the same order

presented by Vanguard. Plaintiffs will not respond to Points VII and VIII of Vanguard's Brief, pp. 43-48, which discuss the plaintiffs' arguments raised on their cross-appeal.

Issues Presented

1. Whether the jury was entitled to find that Music Research sustained damages as a result of its reliance upon Vanguard's misrepresentations.

2. Whether the jury's verdict is supported by the evidence.

3. Whether the Trial Court erred in holding the alleged unconscionability of Music Research's agreement with John Hurt to be unavailable to Vanguard as a defense to its own tortious conduct.

4. Whether the jury was entitled to find that Music Research reasonably relied on Vanguard's fraudulent statements.

5. Whether Vanguard's statute of limitations defense properly went to the jury for determination.

6. Whether the Trial Court abused its discretion in denying the defendant's motion for relief pursuant to F.R.C.P. Rule 60.

POINT I

MUSIC RESEARCH'S DAMAGES RESULTED FROM ITS JUSTIFIED RELIANCE ON THE DEFENDANT'S FALSE REPRESENTATIONS AND COULD NOT BE THE RESULT OF VANGUARD'S PURPORTED EXERCISE OF CONTRACTUAL RIGHTS.

In Point I of its Brief, pp. 19-25, Vanguard argues that there can be no fraud recovery because Music Research cannot be said to have relied on Vanguard's admitted misrepresentations.* This conclusion is said to follow from the rather peculiar argument that Maynard Solomon's lies were gratuitous, that is, were without legal significance in light of Vanguard's alleged existing right, at the time of Solomon's misrepresentations, to record an unlimited number of Hurt albums by virtue of the 1965 Vanguard-Hurt-Music Research contract negotiated by Gart. Vanguard states in its Brief, p.22, that the Trial Court held that this contract was valid and binding on Music Research

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*This Point is urged despite the Trial Court's charge to the jury that "the final element of the fraud claim for your determination is whether the plaintiff was damaged as a result of any reliance on any misrepresentation, . . . " (Tr. 464a).

citing pp. 405a-409a of the Transcript. This is simply untrue. The Court merely ruled (as to Vanguard's Rule 50 motion to dismiss all of the causes of action of Music Research) that, since Vanguard's interference with the Music Research-Hurt contract occurred after the executory Vanguard-Music Research-Hurt contract (not yet executed by Hoskins) was delivered to Vanguard by Gart, and since Gart did have some degree of apparent authority to negotiate, that interference was not actionable by Music Research under its three causes of action sounding in tortious interference with contract, unjust enrichment and unfair competition. The Court therefore granted Vanguard's motion to dismiss as to those causes of action, but denied the motions as to the remaining cause of action for fraud (Tr. 408a). Vanguard then argues that since Music Research was merely performing its legal duty to allow Vanguard to release all the Hurt records it wished, which was the real cause of Music Research's damages, it cannot claim that its damages were the result of reliance upon Maynard Solomon's later lies.

Vanguard's argument is premised exclusively on the Trial Court's dismissal of the remaining three counts of the complaint (Tr. 405a-408a). Assuming, arguendo, that

dismissal at that stage was correct, however, the inference that Music Research was bound by Gart's signature does not follow. Vanguard's simple characterization of Gart as possessing "apparent authority" (as opposed to actual authority) does not, in and of itself, permit any third party to create a binding contract with the agent's principal. The third party, in light of all the facts and circumstances, must be justified in relying on the agent's apparent authority in entering into the agreement. As the jury determined, Maynard Solomon was not so justified.

Solomon, at the time he negotiated with Gart, knew that Gart's authority was limited. Solomon was told by Hoskins prior to the commencement of any negotiations, that Music Research insisted on a contract for two and only two records and that Gart could not sign a contract for Music Research (Tr. 90a-91a; 97a). Gart himself testified that, prior to the commencement of any negotiations, Solomon "knew that John Hurt was represented by Tom Hoskins" (Tr. 389a). Gart also candidly admitted that he never received authority to sign that 1965 contract on behalf of Music Research (Tr. 387a).

Indeed, Solomon's knowledge of the restraints on

Gart's authority was evident from the very documents he himself prepared. Solomon's own typewritten notes, made prior to his entry into negotiations (Tr. 345a) specify the "contract to be signed also by TOM HOSKINS, . . . " (Exh. 20, 494a) (mislabled as Exh. 54 in the Joint Appendix) and, at the bottom of the page, "please have Mr. Hurt, Mr. Hoskins (representing Piedmont and Mr. Hurt both) and yourself sign and initial all copies . . . " Id. Page 2 of that documents states further, "contract drawn directly with MISSISSIPPI JOHN HURT should be signed by Tom Hoskins as well, . . . " Id., App. 495a [emphasis supplied]. Solomon knew he needed Hoskins signature on Vanguard's 1965 contract. Hoskins had told him that Music Research held the exclusive recording rights to John Hurt (Tr. 91a) a fact Solomon already knew by reason of a letter he had received (and marked "file") a year earlier from Music Research's attorney (Exh. 16, 493a). Indeed, if Solomon did not know that Gart was exceeding his authority, why did Solomon engage in such elaborate attempts to conceal the 1965 contract from Hoskins. Indeed, Solomon (or someone at Vanguard) even went so far as to excise Hoskins' blank signature line from the executed 1965 contract. Compare Exh. 56,

503a with Exhs. 57 and 58, 507a and 511a.* It is spurious for Vanguard to assert that, on this record, the jury was not entitled to find that Vanguard knew of the restraints on Gart's authority when he executed the 1965 contract. As the New York Court of Appeals has held:

> "No principle is better settled in the law, nor is there any founded on more obvious justice than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, . . . " Quinlan v. Providence Washington Ins. Co., 133 N.Y. 356, 364, 31 N.E. 31, 28 Am.St.Rep. 645 (1892).

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*Why also did Solomon at every opportunity deny any knowledge of the existence of the 1963 Music Research-Hurt management agreement (Exh. 1, 486a) -- a document which would lead to embarassing questions concerning the validity of Vanguard's conflicting 1965 contract? As soon as Solomon received a copy of the 1963 Music Research-Hurt contract from a third party in August 1966 (Exh. 104, 549a), he typed a letter for John Hurt to sign (Tr. 355a-356a) retaining Sanford Ross -- Vanguard's lawyer -- to "terminate" the management contract with Music Research. Solomon's fear of exposure was also evidenced by his false written statement three months later to one George Goldstein that "we [Vanguard] have no information on the management agreement between Mr. Hurt and Music Research, Inc." (Exh. 36, 500a).

In accordance with this rule, it cannot be seriously disputed that the jury was entitled to find that Maynard Solomon knew that Gart had only limited authority with respect to negotiation of the 1965 contract. Possessing this knowledge, Solomon cannot be heard on appeal to rely on Gart's "apparent authority" to insulate him from the legal effect of his own fraudulent conduct. Restatement (Second) Agency, §§8, 49 and 166 (1958); Ford v. Unity Hospital, 32 N.Y.2d 464, 472, 299 N.E.2d 659, 346 N.Y.S.2d 238 (1973).

Clearly, the import of Judge Brieant's ruling on Vanguard's Rule 50 motion was that, if the jury believed that Solomon knew that there could be no binding contract without Hoskins' signature, then the 1965 agreement was executory and not binding on Music Research. Vanguard's admitted fraud thereafter was therefore actionable by Music Research. Otherwise, the jury would not have been given the scope of Gart's authority as a question of fact for its resolution. This reasoning was understood by Vanguard's trial counsel who offered no objection to the jury charge. Thus, even if there were error, it has been waived.

Further, Vanguard would have been under a duty of

inquiry to ascertain the true scope of Gart's authority before executing the 1965 agreement, if Gart had represented to him that Hoskins' signature was not necessary to bind Music Research, having already been told by Hoskins, himself, that his signature was required.

This principle has been reaffirmed repeatedly by this Court and by the courts of the State of New York. In Franhan Distributors v. New York World's Fair, 124 F.2d 82 (2d Cir. 1941), this Court was faced with a "contract" allegedly made by an apparent agent in the face of a prior communicated limitation. As this Court there held (124 F.2d 82, 85):

> "But where a bidder had been previously informed, as this plaintiff had been, that the only binding acceptance of a bid would be a notice in writing signed by a duly authorized representative of the Fair it was bound to know that any other mode of acceptance would be a departure from that prescribed and ostensibly unauthorized. The plaintiff was, accordingly, also bound to take suitable steps to ascertain the actual authority of those with whom it undertook to deal in a manner other than that which it had been informed was essential to the making of a valid contract. The unperformed duty of inquiry may, and often does, make it impossible to rely upon any so-called apparent authority of an agent." [citations omitted].

Vanguard's failure to take suitable steps to ascertain Gart's actual authority is readily understandable. Maynard

Solomon, who wanted more than two records out of this deal, could achieve that end only by using Gart's apparent authority as an excuse to justify Vanguard's otherwise unauthorized contract. This was the theory upon which the plaintiffs' case was submitted to the jury on summation (Tr. 441a), and this is what the jury determined as a matter of fact. Under these circumstances, Vanguard should not be permitted to avoid liability by relying on an executory contract deceptively negotiated and fraudulently concealed. As one New York appellate court has explained:

> "In this jurisdiction protection is given to one who is injured by falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference whether the fraud goes to the factum or whether it is preliminary to the execution of the agreement itself." [citations omitted]. Angerosa v. White Co., 248 App.Div. 425, 290 N.Y.S. 204, 213 (4th Dep't 1936), aff'd, 275 N.Y. 524, 11 N.E.2d 325 (1937).

Vanguard also cites as erroneous the Trial Court's charge which enumerated the representations allegedly made by Vanguard (Tr. 460a, Vanguard's Brief, p.19). Vanguard argues that each one of the alleged representations must appear in the record in haec verba or the verdict must fall. Such is not the rule. Vanguard need not utter such statements if, in light of its

knowledge, the fair import of its remarks and its conduct is calculated to deceive. In this respect Vanguard's silence -- its failure to correct the misapprehension it knew existed -- constitutes a sufficient predicate for the charge.

As one New York court has explained:

> "The principle of the decisions is that a party is answerable for what he intends to accomplish; that one who intentionally deceives another to his injury, no matter how, is accountable for the wrong; that a party is liable for misrepresentations, either by conduct or by words, made for another to act upon, if they were calculated to deceive and if in fact they do deceive such other person into acting in reliance upon them to his injury. It is quite as easy to deceive by acts as by words and the deed is often more effectual than the word. But the law is not so blind or so absurd as to judge an act by the means regardless of the motive." Ottinger v. Bennett, 144 App.Div. 525, 129 N.Y.S. 819, 825 (1st Dep't 1911) (Miller, J. dissenting), rev'd, 203 N.Y. 554, 96 N.E. 1123 (1911).

All of the alleged misrepresentations were fairly inferable from the facts. Even if this were arguably not so, the opportunity to remedy the situation was waived by Vanguard's counsel's failure to lodge a timely objection to the charge.

Finally, even assuming, arguendo, that the validity

of the 1965 contract may not be challenged by Music Research, the fraud verdict must still be affirmed. Hoskins was willing to permit Vanguard to profit from the release of two records of Hurt's music in order to help create a larger consumer market for the remainder of Music Research's material. As Hoskins testified:

> "The distribution and publicity from the major company would make his name even more widely known and would increase the value of the material that I had already recorded. Such that some two or three years after the release of records on a major label, I would be able to bring out the material that I had already recorded and the market would already be created." (Tr. 88a) [emphasis supplied].

The second Vanguard album (Exh. 10) was released in September of 1967. The third Vanguard album was not released until April of 1971 (Exh. 12), just prior to Adelphi's planned release of the Memorial Anthology Album pursuant to the Adelphi-Music Research contract of April 8, 1970 (Exh. 11). It can be infered from the evidence that Hoskins felt secure in his original plan in light of his belief that Vanguard could not release additional Hurt material after its second album. This belief was induced by Maynard Solomon's false statements to Hoskins concerning Vanguard's 1965 contract (Tr. 90a; 96a-100a). Hoskins, relying on the facts as Vanguard

had represented them to be, timed the release of Music Research's vault material as he did, thus placing Music Research in the catastrophic market position which resulted after the wholly unexpected release of Vanguard's third album (Tr. 469a-470a). Thus, due to Hoskins' reliance on Solomon's misrepresentations, the major asset of Music Research, the vault tapes, was reduced drastically in value to the extent found by the jury.*

POINT II

THE DAMAGE AWARD WAS FULLY SUPPORTED BY THE EVIDENCE.

In Point II of its Brief, pp. 26-30, Vanguard argues that there was no evidence to support the damage award. This is simply untrue. As the Court charged, without objection, the rule for damages caused by another's tortious conduct is indemnification, i.e.,

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*See, e.g., Rosenthal's testimony that "Certainly nobody would now pay $250,000 for those tapes, although they would have in 1970 based on the market value which had not been pre-empted . . . " (Tr. 267a).

actual pecuniary loss caused by the defendant's conduct (Tr. 469a). The Trial Court instructed the jury that it could only consider the damages to Music Research and no one else (Tr. 469a-471a). The Court also instructed the jury what it was entitled to consider in assessing Music Research's damages, namely, (a) all its expenses in the recording and preparation of its John Hurt Memorial Anthology (Tr. 470a); (b) its losses arising out of the claimed frustration of the contract it had with Adelphi, Id.; (c) the difference between the fair market value of Music Research's inventory of John Hurt tapes before Vanguard's release and sale of its third and fourth albums and that value after the release of those albums, Id.; and (d) future profits which Vanguard can make from records produced from other Hurt tapes continuing in Vanguard's possession.

As to (c), above, when the destruction or depreciation of personal property is involved, the rule dictates that damages be measured as "the difference in the market value of that property immediately before and immediately after the injury . . . " 13 N.Y. Jur., Damages, §96 (1960). The plaintiff demonstrated the value of its tapes through the testimony of experts, long recognized as an appropriate

vehicle for proving market value. 3 Wigmore, Evidence, §711 (Chadbourn rev. 1970); Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 697-700 (1933); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Universal Pictures Co. v. Harold Lloyd Corporation, 162 F.2d 354, 368-369 (9th Cir. 1947). Three experts testified. Eugene Rosenthal, after first having been qualified as an expert, testified that, in his opinion, the value of the vault tapes in 1970 was $250,000 (Tr. 263a-264a), and that the present value was $5,000 to $10,000 (Tr. 264a-265a). The basis for this opinion was, in part, the projected sales potential for John Hurt material, that is, how much the vault tapes were capable of producing for the owner thereof (Tr. 268a). Mr. Rosenthal concluded that five LP (long playing) recordings of John Hurt's music and dialogue could be produced from the tapes (Tr. 263a), and that his opinion was based on projected sales of these five recordings as either of two separate packages -- two double LP's and one single LP release -- or five single LP releases (Tr. 270a-271a). He further projected sales of 35,000 for each LP recording (Tr. 291a) and a profit margin of $1.41 per LP (Tr. 271a). Five LP recordings

times 35,000 in sales at a profit per record of $1.41 yields a value of $246,750.00. When foreign leasing revenues are added, the total increases by $42,525 (Exh. 91, 537a) to a total of $289,275.00.

Eugene Denson also testified for the plaintiff in an expert capacity. In his expert opinion, a company could have sold "30,000 to 50,000" of each of the five single LP recordings (Tr. 324a). The jury was entitled to accept Denson's 50,000 sales figure and was further entitled to use Denson's profit margin of $1.50 (Tr. 321a). Thus, using Denson's sales figures and profit margin, the value of the tapes in 1970 was $375,000 (50,000 x 5 x $1.50) plus added revenues based on foreign licensing of $42,525 for a total of $417,525 after deduction of off-setting expenses (Tr. 271a-272a; 321a). Thus, the $275,000 verdict is clearly supported by the evidence.

Vanguard, in its attempt to avoid the verdict, also argues that the 1970 Adelphi-Music Research contract necessitates a lower damage award as a matter of law.

The Court dismissed with prejudice Adelphi's claims against Vanguard, ruling in effect that since Vanguard's

fraud occurred long before Adelphi ever had a contractual relationship with Music Research, no reliance by Adelphi upon misrepresentations of Vanguard was possible, and that therefore Adelphi's claims against Vanguard should be dismissed with prejudice (Tr. 404a-406a). The inference was that if Adelphi had any claim at all, it would be against Music Research with whom it had privity of contract. The Court did, however, instruct the jury (Tr. 470a) that, in addressing itself to the question of what were the losses of Music Research arising out of the claimed frustration of the contract it had with Adelphi, it could look at the Adelphi-Music Research contract which was in evidence. This ruling was entirely correct since Adelphi was in the same shoes as anyone who might have a claim of any kind against Music Research. The Court did not err, therefore, in instructing the jury not to concern itself with Adelphi Records' loss, nor in instructing the jury that it might consider any one or more of several elements of damages in determining the actual pecuniary loss of Music Research caused by its reliance on fraudulent misrepresentations of Vanguard.

But even if the jury elected to formulate its verdict by modifying the damages on account of the Adelphi

contract, it would be entitled to calculate the 50,000 LP sales of expert Denson (Tr. 323a), as corroborated by expert McLynn (Tr. 308a), times the $1.25 each Music Research was to get ($62,500.00) plus the same 50,000 LP sales of Denson and McLynn times Denson's $1.50 net profit per record (Tr. 321a) times the remaining three LP's worth of material still in Music Research's vault tapes ($225,000.00) for a total loss of $287,500.00, before taking into account the further losses occasioned by Vanguard's continued possession of Hurt tapes other than Music Research's vault tapes (Tr. 471a), and some $42,525.00 of foreign license royalties. The jury verdict of only $275,000.00 is therefore a conservative award considering what they were entitled to award, even if they modified it on account of the Adelphi contract, which they were not obligated to do. The Adelphi contract, moreover, did not obligate Music Research to allow Adelphi to produce any set number of recordings and made the release of each proposed LP contingent upon a written consent to be signed by an officer of Music Research (Exh. 11, 489a).*

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*Contrary to Vanguard's statement, the 1970 agreement did not constitute a license of all the vault material to Music Research. The 1970 agreement simply permits Adelphi to produce a "2-record LP set" (Exh. 11, ¶2, 489a) from music contained on the vault tapes. (Tr. 290a).

Finally, much is said in Vanguard's papers concerning this "grossly excessive" award (Vanguard's Brief, p.30). An examination of the evidence, however, reveals the true nature of the numbers involved in this litigation. Vanguard's own royalty statements (Exh. 63a, 516a-533a), obtained by the plaintiffs during pre-trial discovery, evidence the minimum number of Hurt records sold by Vanguard. These statements, which do not include foreign licensing and tape income (admitted by Maynard Solomon to be at least $17,530.32 (Exh. 63, 513a)), indicate the following number of records sold for the four John Hurt albums produced by Vanguard:*

Mississippi John Hurt Today (Exh. 9)	29,117
Immortal Mississippi John Hurt (Exh. 10)	16,482
Best of Mississippi John Hurt (Exh. 12)	30,272
John Hurt: Last Sessions (Exh. 14)	8,285

These albums sold for approximately $6.00 each.** Thus, a total retail gross of at least $504,936 was

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*These figures are not complete. Vanguard produced royalty statements only through June 30, 1975 (516a). All of these records are still being sold today.

**The "Best of" album sold for $5.98 through April 1, 1974 and $6.98 thereafter. the "Last Sessions" album retailed for $5.98. (Deposition of Maynard Solomon, pp. 94-95)(not part of record on appeal, filing having been waived by stipulation of counsel).

realized up to the date of Vanguard's last royalty statement. For just the third and fourth albums, a minimum retail gross of $231,342 was realized through June 30, 1975. This amount does not include foreign licensing and tape income.

When considering this $504,936 figure, it is interesting to note that that sum was realized by the sale of five long playing Vanguard records, the same number of LP's producible by the vault tapes, commencing in August, 1966 (Tr. 104a), a full four years prior to the "peak" of the market for folk music (Tr. 273a). Further, these sales were realized despite the poor quality of Vanguard's third album (Tr. 309a-310a) -- quality which adversely affected the sales of Vanguard's fourth album. Id.

The magnitude of the damages was at all times obvious to everyone. Judge Brieant, in denying the plaintiffs' request for a charge on punitive damages stated: "If their [the plaintiffs'] claim is believed, it is a tremendous amount of actual damages. If the jury finds for you, the amount involved is quite substantial. . . " (Tr. 424a). Moreover, the plaintiffs were denied injunctive relief with the statement that the "plaintiff has an adequate remedy in law for money

damages." (Tr. 424a).

All of Vanguard's arguments with respect to the verdict revolve about its own failure to present a credible rebuttal defense at trial. The only attempt Vanguard made at countering the plaintiffs' experts and documents was Exhibit 63 (513a), a self-serving conclusory document prepared by Maynard Solomon in response to the plaintiffs' demand. That statement concluded that Vanguard earned a total of $6,063.59 "before overhead & taxes" on the sale of two records which -- by Vanguard's own royalty statements -- grossed over $230,000 in retail sales. Indeed, despite the plaintiffs' subpoena duces tecum, Mr. Solomon conveniently neglected to respond with the underlying documents needed to support this patently absurd claim (Tr. 373a-374a). The jury simply did not believe him.

In summary, the defendant could have offered its own experts to testify to the value of the vault tapes which were available for its review (Tr. 77a), but it chose not to do so. The defendant could have rebutted the plaintiffs' experts' assumptions with its own business records and with its alleged sales experience -- records and experience peculiarly within its own knowledge -- but it chose not to do so. As this Court

explained in Shapiro, Bernstein & Co. v. Remmington Records, Inc., 265 F.2d 263, 272 (2d Cir. 1959),

> "In the case before us one party or the other must suffer possible injury because of the lack of evidence on which an accurate award can be based. The possibility of such injury must fall upon either the copyright owners or upon the infringers. That our resolution of this choice involves the risk of a determination lacking in mathematical accuracy is a consequence defendants have brought on themselves."

There is no reason why, on this record, the defendant should be deemed an exception to this rule and be permitted to escape a jury verdict fully supported by the available evidence. As the Trial Court explained upon denial of the defendant's motion to reduce the verdict as being excessive and against the weight of the credible evidence,

> "The whole matter revolves about whom you believe, and the jury has the right to believe. I don't resolve issues of credibility." (Tr. 483a).

POINT III

THERE WAS NO ERROR IN EXCLUDING EVIDENCE CONCERNING THE LEGAL SUFFICIENCY OF THE 1963 MUSIC RESEARCH-HURT MANAGEMENT AGREEMENT

After Hoskins' direct testimony, the Trial Court

ruled that the alleged unconscionability of the 1963 Music Research-Hurt Management Agreement (Exh. 1, 486a) was not a defense available to Vanguard (Tr. 136a-144a). In so ruling, the Court, among other authorities, relied on Union Circulation v. Hardel Publishers Service, 6 Misc.2d 340, 164 N.Y.S.2d 435 (Sup.Ct. N.Y.Cty. 1957). A reading of Union Circulation confirms the correctness of the Trial Court's ruling. If Music Research's 1963 agreement was "unconscionable", then it was simply unenforceable as to only that portion treating a party unfairly and only if the other party sought to have a court enforce the contract. In no case is such a contract void ab initio. Union Circulation, supra, 164 N.Y.S.2d 435 at 438. It is well-settled that the alleged unenforceability of a contract may not be raised by an unrelated third party as a defense to that party's tortious conduct. W. Prosser, Law of Torts, Interference with Contractual Relations, §129 (4th ed. 1971), pp. 932-933; Philadelphia Record Co. v. Leopold, 40 F.Supp. 346, 348 (S.D.N.Y. 1941). While Union Circulation involved the tort of tortious interference with contract rights, the rule is not so limited. Rice v. Manley, 66 N.Y. 82 (1876), the Court of Appeals case cited as supporting

authority by the Union Circulation court, involved, as in the instant case, an attempted defense to a fraud claim.

Further, as a matter of law, the 1963 contract was neither unconscionable as written nor as applied.* It is noteworthy that the defendant's assertions to the contrary at pages 31 and 32 of its Brief are wholly unsupported by legal authority.

In summary, the rights of Music Research under its 1963 contract with John Hurt were enforceable property rights regardless of that contract's alleged unconscionability. The Trial Court's ruling excluding evidence on this issue was therefore correct.

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*Hoskins testified that, despite the 50% clause in the management agreement, Hurt or his widow received about 80% of the earnings from recordings released by Music Research (Tr. 66a) and about the same percentage of earnings from all other sources (Tr. 82a-86a).

POINT IV

MUSIC RESEARCH REASONABLY RELIED ON VANGUARD'S FRAUDULENT STATEMENTS.

In Point IV of its Brief, pp. 33-36, Vanguard attempts to negate the reliance element of fraud by arguing that Hoskins knew (either directly or through Gart) that the various representations made by defendant's agent, Solomon, were untrue. Thus, argues Vanguard, Hoskins could not be justified in relying upon these representations. In so arguing, Vanguard cannot dispute that, as a matter of fact, the jury found that Hoskins was unaware in his own mind that the various representations were false when made. The Court, without objection, specifically charged:

> "If you find that the false representations were made with intent to deceive, then you must determine whether the plaintiff's agent, Hoskins, or President Hoskins, believed the representations and whether he acted in justifiable reliance on them.
>
> * * *
>
> "Obviously, if you don't believe what they tell you, you cannot be said to rely reasonably on it." (Tr. 461a-462a).

Thus, in order to prevail on its theory, the defendant must argue that Hoskins knew the true facts as a matter of law, either by imputation of such knowledge through Gart, or through a finding that Hoskins must be

deemed to have such knowledge by virtue of his receipt of defendant's Exh. G-2 in June, 1966 (569a).

Under the facts at bar, Gart's knowledge cannot be imputed to Music Research. While defendant, in its Brief, cites the general rule that an agent's knowledge is imputed to his principal, defendant neglects to cite the well-established exception to the rule "in those cases where the conduct and dealings of the agent are such to raise a clear presumption that he will not communicate the facts to the principal, . . . " Tree Plateau Co. v. Mount Vernon Mills, Inc., 22 App.Div.2d 587, 257 N.Y.S.2d 733, 736 (1st Dep't 1965); Mut. Life Ins. Co. v. Hilton-Green, 241 U.S. 613, 622-623 (1916); 2 N.Y. Jur., Agency, §268.

This well-settled exception has been repeatedly affirmed by New York courts. See, e.g., Reynolds v. Snow, 10 App.Div.2d 101, 197 N.Y.S.2d 590, 598 (1st Dep't 1960), aff'd, 8 N.Y.2d 899, 168 N.E.2d 822, 204 N.Y.S.2d 146 (1960); Hurley v. John Hancock Mut. Life Ins. Co., 247 App.Div.2d 547, 288 N.Y.S. 199, 203-204 (4th Dep't 1936); Tree Plateau Co., supra. The exception applies to the instant case.

Everyone to the transaction knew from the commencement of negotiations that the deal involved only two

records, and that Hoskins insisted that his signature must appear on the contract. Hoskins announced those facts at the preliminary meeting attended by himself, Gart, Solomon and Hurt (Tr. 90a-91a). After Gart failed to comply with Hoskins' instructions and negotiated more than a two record deal with Solomon, Gart signed the contract "at Vanguard's offices" (Tr. 388a) and then took the contracts back to his office to get Hoskins' signature. Id. When Gart was unable to obtain Hoskins' signature, he returned the unsigned contracts to Solomon "for Vanguard to collect his [Hoskins'] signature." Id. Therefore, at the time Solomon received the unsigned contracts back from Gart, he knew that Hoskins was laboring under the misapprehension that the deal was for only two records* and that Hoskins

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*Indeed, a necessary predicate to the jury's finding of scienter is that Solomon deliberately concealed the existence of the Vanguard-Hurt agreement from Hoskins because Solomon knew that Hoskins was unaware of the terms of that instrument. As Hoskins testified at Tr. 97a:

"Q Did you ever have a conversation either at this meeting at the hotel you just referred to or at any other times with Mr. Solomon concerning the rerecording by Vanguard of Piedmont records and, if so, what was said in that conversation?

* * *

"A Yes.

THE COURT: All right.

"Q When was the conversation and what was said?

"A I believe the conversation was the first meeting at Mr. Solomon's office and he asked me if on the two (cont.)

had not seen a copy of the contract as finally negotiated by Gart. Under these circumstances, Gart's knowledge of more than two records is not imputable to Hoskins.

Such knowledge would also not be imputable if Gart could be construed as having acted in concert with Solomon for the purpose of defrauding Hoskins, 2 N.Y.Jur., Agency, §268, or if Gart could be considered as having acted as agent in the deal for both Music Research and Vanguard. N.Y.Jur., supra, §269; Otsego Aviation Service v. Glens Falls Ins. Co., 277 App.Div. 612, 102 N.Y.S.2d 344, 349 (3d Dep't 1951). Both the fact of a common fraudulent scheme and the fact of a dual agency relationship may be inferred from the evidence.

After the initial meeting with Gart, Hurt and Hoskins, Solomon prepared a contract with a signature line for Hoskins as Hurt's "personal manager" (a person who Solomon admitted is responsible for obtaining recording agreements (Tr. 342a)). The contract was then negotiated with Gart, a person who, together with

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records, that was part, when I said that I wanted two records and only two records, he asked if it would be all right if on the two Vanguard records they used songs that had already been recorded on the two previous Piedmont records and I said yes, that it would be all right. . . . "

Vanguard's Maynard Solomon, knew that Hoskins insisted on "two and only two" records (Tr. 127a). This negotiation strangely resulted in an executory contract for an unlimited number of records, a contract which found its way into Vanguard's possession without ever having reached Hoskins in final form and with Hoskins' signature line physically excised from the instrument (Exhs. 57, 58, 507a, 511a). Surely, a common fraudulent scheme is inferable from these facts.

Similarly, a dual agency relationship is also inferable from the evidence. It is uncontested that Gart never received any compensation from anyone for negotiating the Vanguard-Hurt contract. Gart's motive was not altogether altruistic, however. He expected eventually to reap the fruits of his efforts in the form of higher commissions earned as John Hurt's booking agent (Tr. 204a). Thus, Gart had an independent interest in completing the deal, a fact implicitly known to both Hoskins and Solomon. It was Gart who first suggested Vanguard to Hoskins (Tr. 89a) as a major label with which a two and only two contract might be made. Gart had a continuing business relationship with Vanguard (Tr. 89a, 163a-164a). Hoskins was obviously under the impression

that Gart was acting as simply "a go-between" between him and Solomon (Tr. 122a), i.e., acting for both of the principals in the negotiations (Tr. 164a), a fact which Solomon well knew after his initial meeting with Hoskins, Gart and Hurt prior to the commencement of actual negotiations (Tr. 90a-91a).

In addition to its argument based on Gart's knowledge, Vanguard also contends that Hoskins must be deemed to have knowledge of the "minimum of two" contract term after he received defendant's Exh. G-2, a letter from Sanford Ross (569a). Under the facts as revealed by the testimony, however, Hoskins' statement that he did not know the true state of affairs until after the release of Vanguard's third album was sufficiently credible to raise a triable issue of fact for the jury. Contrary to the statement in defendant's Brief (p.35) (that Vanguard gave plaintiff "formal written notification,by registered mail, from defendant's lawyer"), Sanford Ross' letter (Exh. G-2) came from an attorney who identified himself in that communication as an attorney for John Hurt, not Vanguard. Furthermore, the letter did not enclose the contract or reveal its terms, but simply communicated that he had been "advised" that a contract with Vanguard had been entered into. Hoskins testified that he

responded to this letter by (1) asking John Hurt whether or not the facts stated therein were true (Tr. 114a), and (2) telephoning Ross with Lee Talbott, another Music Research officer, refuting the claim and advising Ross to send any supporting documents if he had any (Tr. 114a-115a, 119a). To these inquiries, John Hurt answered that he was perfectly happy with the Music Research management agreement (Tr. 114a) and Sanford Ross never responded with any documents (Tr. 115a), even though since he was affiliated with Vanguard, he must have had access to them. Indeed, Sanford Ross, Vanguard's attorney, was never even called as a rebuttal witness by Vanguard, presumably because his testimony in rebuttal (as the testimony of a co-conspirator) would not have been favorable to the defendant. It is absurd to argue that -- in light of these circumstances -- Hoskins is chargeable with knowledge of the "minimum of 2" term of the Vanguard-Hurt contract.*

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*Defendant's attempt on appeal to limit the false representations to whether or not a contract existed also confuses the issue. While Maynard Solomon orally misrepresented that fact (Tr. 102a), the representations made by Vanguard, as the Trial Court correctly charged without objection, went beyond the false statement that a contract did not exist. Thus, even if Ross' letter to Hoskins did put Music Research on notice that a (cont.)

In conclusion, the reasonableness of Hoskins' reliance on Vanguard's false statements was an issue of fact which, without objection, went to the jury for determination. The jury's finding of reasonable reliance was fully supported by the record and should not be disturbed.

POINT V

DEFENDANT'S STATUTE OF LIMITATIONS DEFENSE PROPERLY WENT TO THE JURY FOR DETERMINATION.

At pages 37-38 of its Brief, Vanguard argues that the fraud claim was barred by the statute of limitations as a matter of law. The rule, however, is that, whether a plaintiff should have discovered the fraud by the exercise of "reasonable diligence", is a question to be

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Vanguard-Hurt contract existed, it conveniently neglected to communicate the crucial fact that that agreement, contrary to Hoskins' understanding, called for a "minimum of 2" records. Indeed, after receipt of this letter in June of 1966, Hoskins asked Solomon directly whether Vanguard had signed Hurt to any contract and Solomon answered "no" (Tr. 102a).

resolved by the trier of fact. CPLR §213(9); Flynn v. Royal Development Co., 37 N.Y.S.2d 640, 641 (Sup.Ct. Broome Cty. 1942), aff'd, 265 App.Div. 592, 40 N.Y.S. 2d 418 (3d Dep't 1943).

There is apparently no dispute that Hoskins claimed ignorance of the fraud until the appearance of the third album, or that the jury found that, as a matter of fact, Hoskins was indeed unaware of the fraud until that time.* Therefore, defendant must argue that the plaintiff must be deemed to have knowledge of the fraud either by imputation of such knowledge from Gart or by reason of the receipt of the Sanford Ross letter, defendant's Exh. G-2 (569a).

As explained, supra, however, Gart's knowledge is not imputable to Music Research. Further, the reasonableness of Hoskins' response to the Ross letter was a question of fact. Surely, Hoskins' response cannot be

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*As the Trial Court charged, "Now, as I understand the contentions of the parties, the plaintiff asserts that the coming out of the third record gave him notice of the alleged fraud. That, of course, is entirely a matter for your determination according to the evidence in this case, like all other fact matters that are at issue here." (Tr. 469a).

deemed to be unreasonable as a matter of law in light of all that subsequently transpired. Hoskins did respond to the Ross letter by communicating with both Hurt and Sanford Ross. Neither individual gave Hoskins any reason to feel insecure about the facts as he understood them to be. Ross' letter conveniently neglected to mention the crucial fact that Vanguard purported to have a written contract for an unlimited number of records. Indeed, Maynard Solomon continued to misrepresent the fact even after Hoskins' receipt of the Ross letter (Tr. 102a). In light of these facts, the jury was perfectly entitled to resolve the statute of limitations issue, twice charged by the Trial Court (Tr. 467a-469a, 475a), in favor of Music Research.*

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*It may be noted in passing that the statute of limitations issue was obviously the subject of discussion by the jury which, in the course of its deliberations, specifically requested to know the release date of the third album (Tr. 479a).

POINT VI

THE DEFENDANT'S RULE 60 MOTION WAS PROPERLY DENIED.

In Point VI of its Brief, pp. 39-42, Vanguard argues that the Trial Court's denial of its Rule 60 motion, made some three months after the verdict,* "was a clear cut abuse of discretion." Id. at 42. Vanguard must demonstrate such an abuse if it is to prevail on its argument in this Court.

The crux of Vanguard's Rule 60 argument is that, in July of 1975, some four months prior to the trial, the plaintiffs had re-issued a Canadian record album in the United States embodying John Hurt's music.**

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*The verdict was rendered on October 24, 1975. Judgment was entered on November 10, 1975. Defendant's time to move for a new trial pursuant to F.R.C.P. Rule 59(b) expired ten days later. Defendant moved for a new trial by order to show cause on January 30, 1976.

** The plaintiffs' answering affidavits (608a, 609a; 623a) explained that the July 1975 release was neither a "new" album, nor an album produced from the Music Research vault tapes. The July release was simply a re-issuance of an identical record album that had been selling in Canada under another record label since 1968, Id., and produced a very small profit of several hundred dollars, as expected by Music Research, in view of Vanguard's having pre-empted the market with its albums three and four, a profit well below the projected salvage value of $5,000 to $10,000 (264a-265a).

Moreover, the plaintiffs attempted at the trial to put the album into evidence to corroborate the experts' testimony on the measure of damages, but since its release and subsequent sales figures had occurred after the pre-trial order, and since the Court ruled that no evidence not listed in the pre-trial order would be admitted, plaintiffs could not do so. See, Affidavit of Eugene Rosenthal, sworn to on February 18, 1976, ¶13 at 612a.

In any event, the defendant admitted that the Hurt album was openly selling in New York record shops months before the trial (Affidavit of Maynard Solomon, sworn to on January 29, 1976, ¶4; 577a). In its attempt to explain away its lack of diligence in ascertaining this open and notorious fact, Vanguard submitted papers indicating that there are literally hundreds of record releases each month and that Vanguard is not obligated to be aware of all of them (641a, 643a). This argument was urged despite Vanguard's admission that one of the trade publications it regularly receives listed the plaintiffs' Canadian re-issue just below the listing of a new Vanguard release (See, 644a, 646a, referring to the trade publication described by Rosenthal at 609a-610a).

The Trial Court correctly dismissed that motion as spurious. Due diligence requires more than a casual

attempt at preparation. 7 J. Moore, supra, ¶60.23[4], p.273. See also, Greenspahn v. Joseph E. Seagram & Sons, 186 F.2d 616, 620 (2d Cir. 1951); Alison v. United States, 251 F.2d 74, 76-77 (2d Cir. 1958); Campbell v. American Foreign Steamship Corp., 116 F.2d 926, 928 (2d Cir. 1941) cert. denied, 313 U.S. 573 (1941); Flett v. W.A. Alexander & Co., 302 F.2d 321,324 (7th Cir. 1962), cert. denied, 371 U.S. 841 (1962). There may be hundreds of record releases each month, but the defendant is not litigating over each one of them.

In addition, as Judge Brieant's memorandum endorsement indicated, Vanguard did not demonstrate that "the [new] evidence, if it had been presented at the former trial, would probably have produced a different result." 6A J. Moore, supra, ¶59.08[3], p.59-118; Gill v. United States, 184 F.2d 49, 55 (2d Cir. 1950); Memorandum decision dated March 3, 1976, 678a. Even if the existence of the album were probed extensively at trial, the result would have been the same. The existence of the album did not relate at all to the issue of liability and related to the damage claim only insofar as it might tend to establish that Vanguard's release of its third and fourth albums did not preempt the market for John Hurt recordings. But as Eugene Rosenthal explained

(610a-611a) discussion of the album at trial would only have reinforced the plaintiffs' opinion that the vault tapes had only salvage value and may, indeed, have raised (not lowered) the verdict by lowering the $5,000 to $10,000 residual value expressed by Rosenthal (Tr. 264a-265a).

Defendant's last argument is that the "Plaintiffs resorted to flagrant perjury to conceal their release of the new Hurt album." (Vanguard's Brief, p.40). In support of this bald allegation defendant cites two statements in its Brief, both of which were also alleged to be perjurious in Vanguard's Rule 60 motion litigated in the Trial Court (634a-635a). The first statement Vanguard cites is by Hoskins. In its Brief, however, (p.40) Vanguard conveniently neglects to cite the full colloquy contained in the record. As Hoskins testified at Tr. 199a-200a:

> "Q Mr. Hoskins was it your present intention in the summer of 1975, to put out a Mississippi John Hurt record album?
> "A The summer of '75?
> "Q Yes, sir.
> "A No.
> "Q You had trouble with that question.
> "A I'm not sure exactly what you mean.
> "Q Don't you intend to put out another Mississippi John Hurt album?
> "A I would like to, yes, sir.
> "Q So what you have referred to as worthless tapes have some market value, don't they?
> "A Yes.

"Q You intend to put out a record album having to do with twenty-five hours contained on this exhibit in evidence don't you, sir?
"A Yes."

Defendant's counsel was referring at that stage to a proposed new album of previously unpublished material to be produced from the vault tapes, and his questions were meant to be understood in that context. The record reveals this intention at Tr. 276a where, in cross-examining Rosenthal, Vanguard's trial counsel asked,

"Q Have you made any projections on paper about the new album you are going to put out after this lawsuit?
"A What new album?
"Q The new album that Mr. Hoskins discussed on his direct testimony. Weren't you here during his testimony?
"A Yes." (Tr. 276a).

The second statement alleged to be perjurious involved Eugene Rosenthal's response concerning whether he had made a Hurt master (Tr. 287a). In the context of the testimony, however, Vanguard's trial counsel was inquiring into whether or not the plaintiffs' John Hurt Memorial Anthology album effort, that is, the subject of their 1970 contract, had ever reached the mastering stage. That was the import of the question, and that was the context of the response.

In any event, even assuming, arguendo, that the

statements attributable to Hoskins and Rosenthal were untruthful, the movant's burden under F.R.C.P. Rule 60(b)(3) is not met by a mere allegation that certain statements, taken out of context constitute a fraud on the Court. Jungersen v. Axel Bros., Inc., 121 F.Supp. 712 (S.D.N.Y. 1954), aff'd, 217 F.2d 646 (2d Cir. 1954), cert. denied 349 U.S. 940 (1955), rehearing denied, 350 U.S. 868, involved a proceeding to set aside a prior judgment as fraudulently obtained by perjurious testimony. In denying the motion for relief, the District Court assumed for purposes of the motion, that certain testimony was perjurious (121 F.Supp. at 715). The Court, however, despite this assumption, denied relief because the testimony, even if false, was not material to the decision reached. Id.

The instant case is similar to the situation in Jungersen. In this case, as in Jungersen, not only are the allegations of perjury strongly denied by the plaintiffs, but even assuming, arguendo, false statements made during the trial, the matters allegedly withheld by the plaintiffs are irrelevant and immaterial to the facts upon which the verdict was predicated. At best, revelation of the re-issue would simply have been additional evidence that the Music Research vault tapes had at least some value.

But both Hoskins and Rosenthal admitted this fact at trial (Tr. 200a and Tr. 264a-265a). The rule in this respect is well-settled.

> "In general, a new trial is not warranted unless the evidence, if it had been presented at the former trial, would probably have produced a different result. Evidence, therefore, that is merely cumulative or whose only effect is to contradict or attack the credibility of witnesses will ordinarily not warrant a new trial, in the absence of very unusual or extraordinary circumstances." 6A J. Moore, supra, ¶59.08[3], pp.59-118 to 59-120.

See also, Campbell v. American Foreign S.S. Corp., supra; Hadden v. Rumsey Products, 196 F.2d 92 (2d Cir. 1952); Kolan v. Csengeri, 268 F.2d 239, 240 (2d Cir. 1959); Kupferman v. Consolidated Research & Mfg. Corp., 53 F.R.D. 387 (S.D.N.Y. 1971), aff'd, 459 F.2d 1072, 1081 (2d Cir. 1972) ("Ross made no misrepresentations; it would be going too far to characterize as 'fraud upon the Court' his failure to disclose an instrument which he could have supposed reasonably -- although, as it now appears, erroneously -- to have been known to his adversary.").

The Trial Judge was best equipped to make the decision. He heard the evidence. He knew the context of the testimony. He saw the witnesses and studied their demeanor. In this context the Trial Court's state-

ment in denying the defendant's Rule 60 motion is entitled to substantial weight. As the Court there stated,

> "The Court has studied the trial record in this action with care. Viewing movants' contentions as favorably as the background of this litigation and the record of the trial permits, there is no showing that the plaintiff obtained its verdict by fraud, misrepresentation or other misconduct." Memorandum decision dated March 3, 1976, 678a.

It surely cannot be said on this record that the Trial Court abused its discretion in denying Rule 60 relief to the defendant in this case.

Conclusion

For the aforesaid reasons, the judgment rendered on the verdict herein, and the Trial Court's denial of the defendant's post-trial motions pursuant to F.R.C.P. Rules 59 and 60 should be affirmed in all respects.

Respectfully submitted,

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